Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 21, 2014

CLAIM NO. 201301192

RANDY DEAL PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

HARLAN DEVELOPMENT
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

ALVEY, Chairman. Randy Deal ("Deal") appeals from the November 6, 2013 order entered by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"), dismissing his claim for coal worker's pneumoconiosis ("CWP") benefits against Harlan Development ("Harlan"). No petition for reconsideration was filed.

On appeal, Deal argues the ALJ erred in dismissing his claim as untimely filed because, pursuant to KRS 342.316(4)(a), he had five years in which to file his claim. Deal argues the CALJ too hastily dismissed the claim without allowing the presentation of evidence. We disagree. The CALJ did not err in dismissing Deal's claim both based upon the applicable statute of limitations, and the fact he failed to join this cause of action with separate claims for injury and hearing loss stemming from the same date which were fully resolved prior to the filing of the Form 102. Because we determine the CALJ did not err in dismissing Deal's claim, we affirm.

The following chart sets forth the chronology of Deal's various claims.

CWP CLAIMS	**INJURY/HEARING LOSS CLAIMS**
12/29/1993 Hon. Thomas Dockter, Administrative Law Judge rendered an Opinion, Award & Order based upon injury claim, and RIB benefits based upon 1/0 readings from Dr. William Anderson and Dr. Glen Baker	
	10/26/2011 Deal filed a Form 101 alleging injuries to his right shoulder, neck, abdomen, back, feet and legs in a work-related accident occurring 10/28/2009, which was assigned claim number 2009-73420.

	5/23/2012 Hon. Edward D. Hays, Administrative Law Judge awarded permanent partial disability benefits based upon an 8% impairment rating for injuries.
	7/30/2012 Deal filed a Form 103 alleging hearing loss from a last exposure date of 10/28/2009, which was assigned claim number 2012-00986. Deal stated he first became aware of the hearing loss on 7/11/2012.
10/15/2012 Deal filed a motion to reopen claim number 1991-15712 & 1990-18664 to assert a worsening of condition for CWP since the 12/29/1993 award	
11/27/2012 CALJ denied the reopening because it was filed more than four years after 12/12/1996	
	12/21/2012 Order approving settlement of hearing loss claim for $3,000.00
4/15/2013 This Board affirmed the CALJ's denial	
5/2/2013 Deal appealed this Board's decision to the Kentucky Court of Appeals	
8/5/2013 Deal filed a Form 102, which was assigned claim number 2013-01192, alleging a last injurious exposure of 10/28/2009. Deal attached report from Dr. Glen Baker dated 7/27/2013 with an x-ray reading of 1/0	

11/6/2013 CALJ dismissed the claim because it was filed more than 3 years after the last exposure date, and it was not joined with the previously filed injury and hearing loss claims stemming from the same date	
2/14/2014 Court of Appeals Affirmed dismissal of Deal's attempt to reopen	

This appeal stems from a Form 102 filed on August 5, 2013 alleging Deal contracted CWP while working for Harlan, on October 28, 2009. Deal had previously filed a claim for a work-related injury he sustained while working for Harlan on the same date with claim number 2009-73420. The injury claim was fully litigated, and he was awarded permanent partial disability benefits based upon an 8% impairment rating in an opinion rendered by Hon. Edward D. Hays on May 23, 2012. He subsequently filed a Form 103 on July 30, 2012 alleging he sustained a hearing loss on October 28, 2009, which was assigned claim number 2012-00986. The hearing loss claim was resolved by settlement which was approved on December 21, 2012. While the hearing loss claim was pending, Deal filed a motion to reopen his previous claim for CWP/Retraining Incentive Benefits, which was denied, and dismissed by the CALJ by order dated

November 27, 2012. The dismissal was affirmed by this Board in a decision entered April 5, 2013, which Deal then appealed to the Kentucky Court of Appeals, and was affirmed on February 14, 2014. On August 5, 2013, Deal filed the Form 102 initiating the current claim, more than three years after his last exposure date.

On September 11, 2013, Harlan moved to dismiss the current CWP claim because it was not filed within three years of the last injurious exposure date as provided in KRS 342.316(4)(a). Harlan noted Deal supported his claim with an x-ray report from Dr. Glen Baker stating he had a category 1 x-ray reading, or 1/0 to be precise. This was exactly the same finding made by Dr. Baker in 1993. Harlan also argued Deal was precluded from filing this claim based upon the joinder provisions of KRS 342.270(1).

On November 6, 2013, the CALJ entered an order dismissing Deal's claim. He stated the dismissal was due to both the fact the claim was untimely filed, and it violated the joinder requirements of KRS 342.270. It is from this order Deal appeals.

Regarding Deal's argument the CALJ erred in dismissing his claim as not timely filed, we find no merit. We first look to KRS 342.316(4)(a) which states as follows:

The right to compensation under this chapter resulting from an occupational disease shall be forever barred unless a claim is filed with the commissioner within three (3) years after the last injurious exposure to the occupational hazard or after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise the employee that he or she has contracted the disease, whichever shall last occur; and if death results from the occupational disease within that period, unless a claim therefor be filed with the commissioner within three (3) years after the death; but that notice of claim shall be deemed waived in case of disability or death where the employer, or its insurance carrier, voluntarily makes payment therefor, or if the incurrence of the disease or the death of the employee and its cause was known to the employer. However, the right to compensation for any occupational disease shall be forever barred, unless a claim is filed with the commissioner within five (5) years from the last injurious exposure to the occupational hazard, except that, in cases of radiation disease or asbestos-related disease, a claim must be filed within twenty (20) years from the last injurious exposure to the occupational hazard.

Deal argues as follows:

According to the Guidebook to Workers' Compensation in Kentucky, and pursuant to KRS 342.316(4)(a), "the time for filing an occupational disease claims [sic] must be filed within 3 years after the diagnosis or symptoms first appear… The maximum period to file most occupational disease claims is 5 years after the employee was last exposed to

> the occupational hazard responsible for causing the disease regardless of when the individual was diagnosed".

Deal argues he last worked for Harlan on October 26, 2009 and filed his claim on August 5, 2013, which is less than the five year time limit. He acknowledged he filed a claim for CWP in 1993 for which he was awarded benefits, but argued he continued to work for different employers afterward. He alleged he saw his family physician for treatment for other ailments subsequent to the October 26, 2009 injuries, then saw Dr. Baker, a B-Reader, who diagnosed CWP by x-ray interpretation on June 27, 2013. Interestingly, this is the same Dr. Baker who diagnosed Deal with the same level of CWP in 1993, with an x-ray interpretation reflecting no progression of the disease. We likewise find it significant Deal filed a reopening of his previous claim on October 5, 2012, alleging a worsening of his CWP for which he was awarded benefits in 1993.

It is disingenuous for Deal to argue he was unaware he had CWP until Dr. Baker provided him with an x-ray interpretation in June 2013. Deal had previously been diagnosed with CWP, albeit while working for another employer, resulting in benefits awarded in 1993. Likewise, he acknowledged or suspected his CWP had worsened in 2012 when he filed the motion to reopen the 1993 claim. Based

upon these facts, it is ludicrous for Deal to argue he was unaware of the existence, or was not informed of the existence of CWP until 2013, when it is obvious he knew, or should have known he had the disease. Based upon these facts, the CALJ did not err in precluding Deal from pursuing his claim because he did not file it within three years of his last injurious exposure.

Regarding the second basis for the CALJ's dismissal of Deal's claim, KRS 342.270(1) expressly provides:

> (1) If the parties fail to reach an agreement in regard to compensation under this chapter, either party may make written application for resolution of claim. The application must be filed within two (2) years after the accident, or, in case of death, within two (2) years after the death, or within two (2) years after the cessation of voluntary payments, if any have been made. <u>When the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.</u> (Emphasis ours)

The above highlighted language is commonly referred to as the "merger" provision of the Kentucky's Workers' Compensation Act. Once an application for benefits

is filed, thereby triggering the start of litigation, KRS 342.270(1) places a burden upon the claimant to join all accrued and known causes of action against the same named employer. The policy underlying KRS 342.270(1) is one of judicial economy. It is intended to eliminate piecemeal litigation, thereby avoiding added costs incumbent in such practices. This statute eliminates from our judicial system in general, this added burden thereby guaranteeing a proper resolution of issues such as offset, credit, excess disability and overlapping disability.

That having been said, we find the language of KRS 342.270(1) to be clear and unambiguous. When a statute is unambiguous on its face, it should be applied without resort to outside aids and it is not open to construction. Coursey v. Westvaco Corp., 790 S.W.2d 229 (Ky. 1990); Overnight Transp. Co. v. Gaddis, 793 S.W.2d 129 (Ky. App. 1990). When the plain language and meaning of the statute is without ambiguity, the intent of the legislature is discerned from what the General Assembly said, not what it might have said, and further interpretation is unwarranted as a matter of law. Clark v. Clark, 601 S.W.2d 614 (Ky. App. 1980); Lane v. Newberg, 841 S.W.2d 181 (Ky. 1992). KRS 342.270(1) clearly provides once an application for benefits has been filed by an injured worker, failure to join all other accrued causes

of action against the same employer which were known or reasonably should have been known to the injured worker, results in those additional claims being forever barred from prosecution.

Nowhere in the statutory language does the legislature expressly exempt claims filed under KRS 342.316 from mandatory joinder. We believe the allusion to the statute of limitations set forth in KRS 342.185 reinforces the fact occupational disease claims are purposely intended to be encompassed by the merger doctrine. Because the limitation period for injuries expires much sooner than for occupational diseases, KRS 342.270(1) has no need to specifically address the limitation period for occupational disease claims. An injury claim must be brought within two years of the accident or two years following termination of temporary total disability benefits, whereas an occupational disease claim may be filed within three to five years of a claimant's last date of exposure. Consequently, for purposes of the merger doctrine, only the shorter period of limitations is crucial. For that reason, it is apparent that in those instances where a claimant simultaneously accrues the right to pursue both an injury claim and an occupational disease claim against the same employer, the occupational disease claim must be brought prior to a final

decision on the merits of the injury claim where an application for the injury claim is initially filed.

In this instance, Deal knew in 1993 he had CWP, as evidenced by his previous award and subsequent motion to reopen. He filed three separate claims, all stemming from the same date. First, he filed the injury claim. When it was concluded, he filed the hearing loss claim. He then filed a motion to reopen which was denied, and while his appeal to the Kentucky Court of Appeals was pending, subsequent to the resolution of the hearing loss claim, he filed this CWP claim. Deal cites to Messer v. Drees, 382 S.W.2d 209 (Ky. 1964), arguing as follows:

> It is important for the Administrative Law Judge to always remember that the compensation law is fundamentally for the benefit of the injured worker, and a just claim must not fall victim to rules of order unless it is clearly necessary in order to prevent chaos.

Piecemeal litigation is precisely the chaos KRS 342.270(1) was enacted to prevent. In light of these uncontested facts, we find no error with the CALJ's order of dismissal.

Accordingly, the order dismissing entered November 6, 2013, by Hon. J. Landon Overfield, Chief Administrative Law Judge, is hereby **AFFIRMED.**

ALL CONCUR.

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